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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-1855

SAMUEL G. BAILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals entered in the above-entitled case on May 18, 1978.

CITATIONS TO OPINIONS BELOW

The Judgment of the Court of Appeals is not yet reported. Said Opinion is printed and attached hereto and made a part hereof as Appendix A.

JURISDICTION

The Ninth Circuit Court of Appeals affirmed the conviction of petitioner on May 18, 1978.

All questions raised in this instant petition were raised in the Court below and on appeal to the Ninth Circuit Court of Appeals.

QUESTIONS PRESENTED

1. Whether unsupported conclusory statements can be used to uphold a search warrant that would be insufficient without them.

2. Whether the testimony of an impeached witness can be the primary basis of a conviction.

3. Whether exigent circumstances, such as public safety, can justify a warrantless vehicle search, when the executing officers had a considerable amount of time in which to apply for a search warrant, to wit, an entire day during which the alleged hazard existed.

CONSTITUTIONAL PROVISIONS

The Constitutional provisions involved in the instant case are the Fourth Amendment to the United States Constitution and the Due Process Clause of the Fifth Amendment printed in 1 U.S.C. XLVI.

STATEMENT OF THE CASE

On May 18, 1977, an indictment was filed in the United States District Court for the District of Idaho charging the petitioner, Samuel G. Bailey, and co-defendants Jon Keith Vander Pauwert (hereinafter referred to as Vander Pauwert) and Bernard Michael Stipa (hereinafter referred to as Stipa) with violations of 21 U.S.C. § 846, conspiracy to manufacture methamphetamine, a controlled substance (C.T. 1)[1/] 21 U.S.C. § 843 (b), willful use of a communication facility to facilitate acts constituting a felony (C.T. 5-7); and 21 U.S.C. §§ 846 and 846 (a)(1) and 18 U.S.C. § 2, attempt to manufacture a measurable amount of methamphetamine (C.T. 8).

1/ C.T. refers to the Clerk's Transcript.

On May 24, 1977, the petitioner was arrested pursuant to warrant (C.T. 10), and bond was set at Five Thousand Dollars ($5,000). Bond was furnished and the petitioner was released (C.T. 13).

On May 26, 1977, the petitioner was arraigned and pled not guilty to the charges (C.T. 22). A Motion for Bill of Particulars was filed on June 13, 1977 (C.T. 31).

On July 1, 1977, Richard G. Sherman was associated with Thomas Jones for the representation of the petitioner (C.T. 44). A Motion for the Suppression of Evidence was filed in the District Court on behalf of the petitioner on July 12, 1977 (C.T. 86). The government's response was filed on July 15, 1977 (C.T. 160).

On July 18, 1977, Thomas Jones withdrew from representation of the petitioner (C.T. 179). On that date, the Court heard and denied the petitioner's Motion to Suppress. Trial by jury was waived, and a Court trial began (C.T. 180).

On July 21, 1977, at the close of the government's case-in-chief, the petitioner

moved for judgment of acquittal. The motion was denied. At the close of the petioner's case, the motion was renewed. The motion was denied. The petitioner was found guilty as charged (C.T. 189).

On August 8, 1977, the petitioner filed the Affidavit of Richard G. Sherman in Support of Defendant's Motions for New Trial and Judgment of Acquittal (C.T. 199). The motions were denied and the petitioner was sentenced to three (3) years in the custody of the Attorney General and a two (2) year special parole term for each of the three counts, the sentences to run concurrently (C.T. 202).

On August 9, 1977, the petitioner filed a Notice of Appeal (C.T. 211). The petitioner was released on bond pending appeal (C.T. 209).

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court on May 18, 1978. On June 7, 1978, the petitioner filed a Petition for Rehearing and Suggestion for Appropriateness of Hearing En Banc. The Court of Appeals for the Ninth Circuit has not yet ruled on the petitioner's request for rehearing.

STATEMENT OF FACTS

In the case at bench, four search warrants were issued on March 26, 1977. One of the warrants was issued for the home of co-defendant Stipa's parents (C.T. 98); one was issued for the mobile home trailer belonging to a Ralph Nydegger (C.T. 99); one was for a 12' x 12' shed (C.T. 100); and one was issued for the home of the petitioner (C.T. 101). The search warrants were based upon a single affidavit of Special Agent William Cornell (hereinafter referred to as Cornell) of the U.S. Department of Justice Drug Enforcement Administration (C.T. 102-106).

In substance, the affidavit states that on March 3, 1977, affiant observed Stipa at a freight depot in Boise, Idaho, picking up three cardboard boxes (the dimensions of each box were particularly described). Affiant and other officers observed Stipa take a very circuitous route from the depot to a tavern (particularly described) in Eagle, Idaho. The affidavit then contained the following unsupported statements:

1. That the cardboard boxes contained monometheylamine;

2. That the boxes were carried into a described shed;

3. That since that time, one bottle was observed being removed from the tavern shed;

4. That on March 25, 1977, two boxes were removed from the shed and taken to the mobile home belonging to a Ralph Nydegger;

5. That Stipa used a false name, John Hansen, W.R. Inc.; and

6. That Jay Ingleby, owner of the Chem Shop in Salt Lake City, told him how much monometheylamine Stipa purchased; that Stipa used the name John Hansen of W.R. Inc.; and that the monometheylamine sent to Stipa was packed in three cardboard boxes.

That affiant then gave the location of P.I.E. Freight Depot and explained how Stipa paid for the delivery, without stating the source of this information.

The affidavit then contained the

following statement unsupported by personal knowledge: Affiant spoke with an employee of Aldrich Chemical House, Phyllis Kratzer, who told him that a male identifying himself as Stipa telephoned Aldrich Chemical House and attempted to order phenylacetone. As phone orders were unacceptable, a letter and money orders were sent. The chemical was packed in a metal drum enclosed in a cardboard box, and shipped. It was to arrive in Boise the same day, March 22, 1977.

Affiant saw Stipa pick up the metal drum and pay shipping costs on March 24, 1977. He followed Stipa to the residence of Samuel Bailey and observed the box carried into the house. The affidavit continued as follows:

1. The metal drum was taken to the mobile home;

2. At the same time monometheylamine and other items were taken into the mobile home;

3. On March 26, 1977, officers smelled the odor of P_2P eminating from the mobile home;

4. Stipa was observed carrying a box from the mobile home into a pickup truck and driving to the Bailey residence;

5. Later on March 26, 1977, officers smelled the odor of ether around the mobile home and observed the air vent on the mobile home completely open;

6. Stipa and an unkonwn female were followed to a drug store and then back to the Bailey residence;

7. At the drug store Stipa attempted to purchase a ring-stand for a bunson burner, and did purchase litmus paper; and

8. When Stipa drove to the Bailey residence he loaded many items in the pickup truck and drove to his parents' home, where he lived.

Affiant spoke with a qualified forensic chemist who gave the opinion that the manufacture of methamphetamine was going on in the mobile home.

On July 18, 1977, an evidentiary hearing was held on the petitioner's Motion to to Suppress (R.T. 16)[2/].

2/ R.T. refers to the Reporter's Transcript.

Counsel for the petitioner stated that the search warrant affidavit was conclusory (R.T. 17) because many times the observer was not identified (R.T. 18), and because there was no information contained within the four corners of the affidavit on how these observations were reported to the affiant (R.T. 19). Counsel for the petitioner cited various examples in the affidavit to support this position (R.T. 20).

The Court stated that the insufficient portions were irrelevant as long as there was enough factual material in the affidavit to support a warrant (R.T. 24-25).

The affiant, Cornell, testified that a United States Attorney assisted him in the preparation, drafting and review of the affidavit (R.T. 27).

The Court denied that portion of the Motion to Suppress that was based on the insufficiency of the affidavit supporting the warrant, finding:

> "It is not a model, but I think it adequately advises a judicial officer of a series of factual matters sufficient so that he could exercise

> his judicial discretion and determine it was a legal warrant to search." (R.T. 31)

Counsel for the petitioner then moved to suppress the warrantless vehicle search.

The government's first witness was Cornell, who testified that he is an agent of the Drug Enforcement Administration (DEA), and was on official duty on February 8, 1977.

On that date, Cornell was advised by Special Agent Orve Hendrix (hereinafter referred to as Hendrix) that Hendrix had received a phone call from the Chem Shop in Salt Lake City. The shop had informed Hendrix that it received an order for seventy eight (78) kilograms of monomethey-lamine from a Jay Hansen, representing W. R. Incorporated (R.T. 36). No such business was listed in the Idaho State Business Records. Hansen had not given an FDA number (R.T. 63). Hendrix found that the phone number Hansen gave was listed to a Ralph Nydegger, Roundy's Trailer Court, Eagle, Idaho.

On March 3, 1977, the monometheylamine

was shipped by the Chem Shop and picked up in Boise, Idaho (R.T. 37) by an individual later identified as Stipa.

Cornell followed Stipa's automobile as it traveled from Boise to a tavern in Eagle, Idaho (R.T. 38).

On March 15, 1977, Special Agent Mike Ebert (hereinafter referred to as Ebert), of the Milwaukee office of the Drug Enforcement Administration, informed Cornell that he had received a letter sent to Aldrich Chemical House requesting six and a half (6-1/2) kilograms of phenylacetone. The letter was signed by a B. Michael Stipa of 9260 Cory Lane, Boise, Idaho, and included money orders in the sum of Four Hundred Eighty One Dollars ($481.00). Cornell and Ebert planned a controlled delivery (R.T. 39).

Hendrix okayed a controlled shipment of the chemicals (R.T. 65). Cornell, acting undercover, pretended to be an employee of the Transfer Company. He called the Stipa residence and informed Stipa's father that the package had arrived (R.T. 82).

On March 24, 1977, Stipa picked up the package sent from Aldrich. He wanted to pay by check, but the company policy was cash only. He returned in less than an hour with a cash payment. Cornell helped him carry the box out to his pickup. Stipa left the area and Cornell joined in the surveillance.

Stipa drove to 4186 Tamarack Drive, Boise, and took the box into the residence (R.T. 41). He exited the residence in about five minutes, and left the area without the box (R.T. 42).

The chemical companies had contacted the Drug Enforcement Administration to make certain that the orders were legitimate (C.T. 43).

Cornell was informed by the Idaho Bureau of Narcotics and Special Agent Jones that on March 25, 1977, Stipa removed a lightweight box from his pickup and went into the shed behind the Kennel Club Tavern near Eagle, Idaho. He made two trips with the box from the shed to the pickup. Stipa then returned to his residence (R.T. 43).

At 4:25 p.m., Stipa drove to 4186 Tamarack Drive under surveillance. The petitioner was not there. He arrived in a Capital Roofing truck at 6:30 p.m. (R.T. 89).

On March 26, 1977, Stipa and Vander Pauwert purchased two bags of ice, then drove up Highway 21 to a camping area (R.T. 45) Cornell personally followed Stipa and Vander Pauwert from the market, down Highway 21, to the camping area (R.T. 95).

Cornell was advised that the lights to the camper were on all night long. The next morning Stipa and Vander Pauwert drove westbound on Highway 21. Earlier that day, Stipa had been observed removing items from the camper and taking them to the mobile trailer home of Ralph Nydegger in Eagle, Idaho. Other officers advised Cornell that they were able to smell phenylacetone and ether (R.T. 46).

Stipa was next observed at the Cory Lane residence, and then in a pickup, proceeding to the residence at Tamarack Drive. Later, Stipa, Vander Pauwert, and a Deborah Moss went to a drugstore (R.T.

47), where they inquired about purchasing a ring stand. They proceeded to a biological supply house, returned to the Tamarack Drive residence, and Stipa then left for the Cory Lane residence (R.T. 48).

Later that day, Vander Pauwert and Deborah Moss purchased a bunson burner, a centigrade thermometer, a ring stand support, and two plastic containers (R.T. 48). They then returned to the Tamarack Drive residence.

At approximately the same time, Stipa returned to the mobile home, loaded boxes and grocery bags into the pickup, and returned to the Cory Lane residence (R.T.49).

That evening, Stipa picked Vander Pauwert up and went to the Tamarack Drive residence. Approximately twenty (20) minutes later, they exited the residence and went to a camp site (R.T. 50). They returned to 4186 Tamarack Drive at approximately 6:58 a.m. in the morning of March 27, 1977 (R.T. 51).

An arrest warrant for Stipa only, and search warrants for the residences of

Stipa, Nydegger, and Bailey, and for the Kennel Club shed, were the only warrants obtained. Cornell went to the Tamarack Drive residence, arrested Stipa and Vander Pauwert, and executed a search warrant for the residence. Stipa's vehicle was placed under seizure and a forensic chemist was contacted (R.T. 52). Cornell testified that he placed the vehicle under seal under authority of the Controlled Substance Act, as a vehicle used in the commission of a felony, and because he believed the chemicals inside the vehicle to be volatile (R.T. 53).

When Cornell and the chemist entered the camper, they observed a gray metal drum, a homemade ring stand, a cello bag containing different pieces of glassware, and miscellaneous items. An odor was emitted from beakers containing an oily-type solution and chopped up tin foil (R.T. 54).

The petitioner was not arrested until a month and a half later because at the time his house was searched, there was insufficient evidence to arrest him (R.T. 104).

The evidence of criminal activity that Cornell had with regard to the petitioner at the time of the search of his house on March 26, 1977, was as follows:

1. The other defendants had been observed going to and coming from the petitioner's residence;

2. Phenylacetone was brought into his residence overnight; and

3. Vander Pauwert was living at the petitioner's residence (R.T. 105), sharing a room with the petitioner's son (R.T. 110).

There was a twelve (12) hour delay before the search warrants were executed (R.T. 106).

As soon as the search of March 27, 1977 was initiated, Cornell requested Stipa's car keys. The camper was searched simultaneous to the search of the residence.

Although the camper was allegedly searched because of a safety factor, during the twelve (12) hours between the issuance of the arrest warrant and Stipa's arrest, the camper was being driven

through the streets. The road had dips and rocks. Cornell could have stopped the vehicle when it was moving, or when it was at the camp site (R.T. 114).

Phenylacetone is not a controlled substance (R.T. 117).

Cornell testified that he believed phenylacetone and metheylamine were in the vehicle (R.T. 126). The arrest was delayed because "it became clear to us they were going to perform a similar function and we just thought it was better to wait until they did something." (R.T. 127).

Robert W. Lawson, hereafter referred to as Lawson, who was qualified as an expert in forensic chemistry (R.T. 135), testified that by itself, phenylacetone cannot become a controlled substance (R. T. 135). Phenylacetone is not volatile under normal circumstances, and is shipped through the mails. It can only blow up if ignited. Metheylamine, however, is highly volatile (R.T. 136).

The Motion to Suppress was then argued by counsel for the petitioner (R.T. 139).

The motion was denied (R.T. 143).

Trial then commenced.

The government's first witness was Donald P. Andrews (hereinafter referred to as Andrews) whose credibility was later seriously questioned. Andrews testified as follows:

He is a self-employed hairdresser living in Twin Falls, Idaho (R.T. 148). On December 17, 1976, Stipa, the appellant and Bob Moore visited him (R.T. 149) and he accompanied them to a restaurant. At the restaurant Andrews and Stipa discussed the process by which methamphetamine is made (R.T. 150). Stipa told Andrews he had studied chemistry (R.T. 151) and Andrews explained to Stipa what ingredients were necessary (R.T. 152-153).

The petitioner and Stipa asked Andrews to make a list of the chemicals. Andrews made a list, including phenylacetone, tin foil, benzine, methyle-ethyl-ketone and phenytendiamine crystals (R.T. 154).

Andrews put chemicals on the list which would not produce methamphetamine because he wanted to discourage them (R.T. 155). The petitioner told Andrews he would receive ten percent (10%) of the gross profit

for his help (R.T. 155). Two or three weeks later, the petitioner telephoned Andrews and stated that Stipa was having problems (R.T. 157).

On February 19, 1977, Andrews, his wife and Mrs. Bailey traveled from San Francisco to Boise, Idaho. They were met at the airport by Andrews' parents-in-law, the petitioner and Vander Pauwert (R.T. 158). The petitioner introduced Andrews to Vander Pauwert at that time (R.T. 159).

Andrews and the petitioner then had a private conversation at which time the petitioner indicated to Andrews that Stipa had all of the chemicals on the list except methylamine and that Stipa would be contacting Andrews (R.T. 161).

Between February 19 and March 5, 1977, there were numerous telephone calls between Andrews and Stipa (R.T. 162). On March 4, 1977, the petitioner asked Andrews to come to Boise to help him do some roofing. The petitioner mentioned that Stipa had gotten all the chemicals necessary to make methamphetamine (R.T. 164).

On March 5, 1977, Stipa picked Andrews up and drove him to Boise. When they arrived in Boise, they stopped at a grocery store and at a drugstore, purchasing such things as glass tubing, surgical hose, flasks and stoppers. They then went to the petitioner's residence on Tamarack Drive (R.T. 165), arriving at approximately 9:30 p.m. Stipa left the house and did not return until after midnight. At that time, Andrews and Stipa went out to get a drink (R.T. 166) at Bailey's suggestion.

Andrews and Stipa went to the Kennel Club Tavern in Eagle, Idaho. Stipa had forgotten his key, so they drove back to Stipa's residence and Stipa found his key. When they arrived back at the Kennel Club, Stipa walked around the building and returned to the truck with a bottle (R.T. 168).

They drove to a telephone booth and Stipa made a telephone call. They then went to a small trailer house in Eagle (R.T. 169). Andrews thought he saw a DEA car go by them and told Stipa that they were being watched (R.T. 170).

Inside the trailer they chatted and had a beer or two. Andrews tried to find out what chemicals Stipa had in the truck (R.T. 171). He helped Stipa carry a bottle of methylamine, a can of methyl-ethyl-ketone, phenylenediamine crystals, flasks, rubber stoppers, glass tubing, surgical tubing and foil into the trailer (R.T. 172). They then tried to run a reaction (R.T. 173). Stipa told Andrews that the methamphetamine would be delivered in Las Vegas by Bailey and Vander Pauwert (R.T. 177).

Between 6:00 a.m. and 6:30 a.m. they loaded the equipment and chemicals back in the truck and drove to the appellant's house (R.T. 178). Andrews, Bailey, Stipa and Vander Pauwert went out to breakfast and then returned to the petitioner's house.

After breakfast, Stipa left the petitioner's house and Andrews went to sleep. When he awoke, Vander Pauwert was cutting up tin foil at the kitchen table (R.T. 179). Stipa returned that afternoon (R.T. 180). At that time, Andrews, Stipa and Vander Pauwert went to Stipa's house to pick up

a bottle of methyl-ethyl-ketone (paint thinner) and they then drove to the Kennel Club. Stipa and Vander Pauwert went around the side of the building and returned with a burlap bag (R.T. 181) containing three bottles of methylamine (R.T. 182).

They drove to the trailer house and there removed the chemicals and equipment from the pickup and placed them in the trailer house (R.T. 183). They attempted to titrate the substance they had begun the night before. The substance did not crystalize. It evaporated. Andrews said that maybe they needed P_2P (R.T. 184). Stipa left and returned with Benzine. Andrews said that Benzine would not work although he had listed it as a substitute for P_2P. Stipa asked Andrews questions regarding how he could acquire some P_2P (R.T. 188). They placed everything back in the truck and returned to the petitioner's house (R.T. 189). Stipa left, and Andrews, the petitioner and Bob Moore played cards until about 11:30 p.m.

The petitioner then wrote Andrews a check for Sixty Dollars ($60) as

compensation (R.T. 190). The petitioner and Bob Moore drove Andrews to the bus station and Andrews rode the bus home.

On March 25, 1977, Stipa telephoned Andrews (R.T. 194) and told him that he was having problems and wanted Andrews to come to Boise (R.T. 195). Andrews told him to heat the substance with a bunson burner.

At the close of his testimony on direct examination, Andrews testified that he has been convicted of and has served time for the felony of forgery (R.T. 196).

On cross-examination of Andrews by counsel for Bailey, the following information was elicited:

1. Andrews has known Bailey for approximately three and one half years and they have been good friends during that time. Bailey was best man at Andrews' wedding. They have never engaged in criminal activity together (R.T. 281-282).

2. Andrews stated that Bailey first approached him regarding the making of methamphetamine on December 17, 1976. Andrews had originally told the government that

the first meeting was in January (R.T. 282-285).

3. Bailey, his brother-in-law, Bob Moore, and Stipa stopped in Twin Falls on their way to the Teton Dam sale with Andrews to purchase vehicles and to speak with George Kinzel, Andrews' father-in-law, about the sale (R.T. 286-288).

4. After Bailey, Bob Moore, Stipa, and Andrews returned from the restaurant, Andrews made the list of chemicals (R.T. 280). He wrote two formulas down - - one for methylamine and one for P_2P. Methylamine plus P_2P is not the formula for methamphetamine (R.T. 291).

5. Andrews has had no experience with the manufacture of methamphetamine; he has never assisted in the making of that drug; but he did tell Bailey that he could make the drug (R.T. 292) when they were in the Idaho State Penitentiary (R.T. 293).

6. Andrews wished to discourage Bailey when he wrote down the formulas. He did not even know if he was writing down correct formulas (R.T. 295). He just picked names out of the air as chemicals of some

sort and wrote them down (R.T. 297).

7. On direct examination Andrews had testified that in order to discourage them he had written down a list of substitutes. On cross-examination, he testified as follows:

"Q. Which items on this list are substitutes?

"A. None of them. It is garbage.

"Q. In other words, to the best of your recollection, then, this entire list was garbage?

"A. That's right." (R.T. 298).

8. On March 6, 1977, when Andrews went to the Kennel Club with Stipa, he saw a bottle of phenylenedramine crystals in the car. Thus, he had written down on the list at least one substance that did exist, although, to his knowledge, the crystals have no use in the manufacture of methamphetamine (R.T. 299-300).

9. Methylamine is an item used in the creation of methamphetamine (R.T. 301).

10. Andrews has never been involved with methamphetamine laboratories, and has never acted as an informant in regard to

methamphetamine laboratories before this case (R.T. 304).

11. When he told Cornell or Hendrix that he knew of a methamphetamine lab that was producing methamphetamine, he was not talking of the alleged lab in the case at bench. He was talking about a "non-existent one" (R.T. 305).

12. On May 18, 1977, Andrews gave the government a written statement in which he stated that on March 6, 1977 he drove with Stipa to the trailer, carried the equipment into the trailer, and told Stipa that he would not participate. On cross-examination, Andrews admitted that this statement was not true (R.T. 306).

13. In his statement of May 18, 1977, Andrews stated that he refused to help the defendants (R.T. 313). That statement was not true (R.T. 314).

14. Andrews' initial statement to the authorities was made orally on May 1, 1977. Andrews made a written statement on May 18, 1977. He made no other statements to the law enforcement authorities (R.T. 321).

15. Since his release from prison, Andrews has not been involved in drug traffic (R.T. 324), but has acted as an informant for state agencies in drug related transactions and has worked with Hendrix in that regard (R.T. 325).

16. Andrews denied that he intended to inform the government of the defendants' activities, and denied that he stated the contrary to any government agent (R.T. 326). He did admit that he knows State Narcotics Agent Glen Ford (hereinafter referred to as Ford) and that he has acted for him as an informant on six different occasions (R.T. 327).

17. TAPE OF MARCH 15, 1977.

On March 15, 1977, Ford telephoned Andrews. Andrews thought that Ford might be recording the conversation. The recording was played for the Court. In the conversation, Andrews stated that he was working on a "big" speed transaction involving Las Vegas, Washington and Oregon. He stated that he would not tell Ford anything until he was ready and that he had been working on the case for four months

(R.T. 334). He would not give Ford the information until he was assured that he would be paid (R.T. 335). He stated that the transaction would happen if he wanted it to (R.T. 336), and that he wanted to be paid by both the state and federal agencies (R.T. 337). On May 1, 1977 Andrews found out that his telephone conversation had in fact been recorded (R.T. 345).

Cross-Examination

On cross-examination, Andrews testified that he told Ford that he was working on "something big", referring to this case, because he decided that the reason Ford called was because he and the defendants were under surveillance. Andrews wanted to give Ford some indication that he knew something was going on and that he was acting as an informant rather than as a criminal participant (R.T. 350). Andrews stated that he was lying when he told Ford that he had been working on the case for four months (R.T. 352). He just picked a number out of the air.

18. TAPE OF MARCH 16, 1977

Hendrix and Ford telephoned Andrews on March 16, 1977 and again recorded the conversation. This conversation was not played for the Court but the Court, the witness and counsel had copies of the transcript of the conversation.

Cross-Examination

Andrews testified that he did not want to tell the government anything at that time because he did not think he had yet acquired the kind of information that the government wanted (R.T. 355), although he had already met the defendants in Twin Falls, had observed that Stipa had chemicals, and had participated in the attempt to make something (R.T. 363).

Defense counsel asked Andrews if the real reason he did not give Hendrix and Cornell information was that he wanted money from the government up front. Andrews replied that it was (R.T. 364).

Defense counsel asked Andrews if he was was truthful when he told Hendrix that he was working on a case involving "pounds of speed." Andrews said that it was not

true (R.T. 368). He also lied when he told Ford that the suspects were manufacturing "about three a week." (R.T. 369).

Andrews lied when he told Hendrix and Cornell that the transaction was going on "right now" (R.T. 370).

Andrews also lied when he told the agents that the transaction was now in Idaho but that it was going across the border (R.T. 374). He told the agents that he was not investigating this job for the pleasure. He had not been investigating the defendants at all (R.T. 378).

When Andrews told the agents that he had the whole plan, he was not being truthful (R.T. 381).

19. TAPE OF MARCH 28, 1977

The final telephone call was made by Hendrix to Andrews on March 28, 1977 (R. T. 384), one day after the arrests of Stipa and Vander Pauwert had taken place (R.T. 385).

In the phone conversation of March 28, Andrews stated that his involvement in

the transaction was that the suspects had come to him for information. He knew how to make methamphetamine and they wanted to know how (R.T. 389). He did not show them anything, but he did give them information. He further stated that he was afraid to let the names of the suspects go (R.T. 390) because he did not know how to uninvolve himself and because he did not want to testify in Court (R.T. 394). He stated he would not divulge information unless it would be profitable to him (R.T. 395).

Andrews said he would be ready to talk to Hendrix in a week at the most (R.T. 397), and that he was not ready at the time because the operation had been moved (R.T. 398), and that he was not exactly sure where it was (R.T. 399).

Andrews then told Hendrix that the suspects were dealing out of state, such as Las Vegas, and that the substance was leaving Idaho in powder form (R.T. 402). He said that the suspects had a lot of chemicals (R.T. 404).

Cross-Examination

On cross-examination, Andrews stated

that he did not know how to produce methamphetamine, contrary to what he had told Hendrix. Andrews stated that he did pretend to show the suspects how to make methamphetamine, contrary to what he had told Hendrix (R.T. 417).

Andrews was just making double-talk when he told Hendrix that he could put things together but would not do so until he received payment from the government. He could never have made the lab a functional operation (R.T. 420).

20. Andrews made a deal with the government that he would not be prosecuted for the offense in this instant case as a result of his testimony (R.T. 427).

21. On direct-examination, the government counsel asked Andrews questions about dates, conversations and detailed moves, and Andrews was able to describe what occurred and when (R.T. 430). On cross-examination, Andrews answered that he did not know to the same questions (R.T. 429).

22. Andrews spoke with the petitioner one week prior to the arrest of Stipa and

Vander Pauwert regarding some roofing (R.T. 431). Andrews said he had done roofing for the petitioner before, and that he had received Sixty Dollars ($60.00) for materials, not for illegal activities (R.T. 432).

23. On March 28, 1977, Andrews told the agents that the lab had been moved. This was not truthful. There was only a possibility that the lab might be moved into the woods if the reaction were successful (R.T. 433).

24. Andrews never intended to tell Hendrix the truth about anything that he did not want to tell him (R.T. 434-435).

At this point in the cross-examination the following colloquy occurred:

> "The Court: It's so obvious, it sort of sticks out. I dare say that you know and I know that this is not unusual in this kind of a game, the undercover game. It's a way of life and you know it and I know it, so it doesn't surprise you. However, you are entitled to make your record in this matter and you may proceed.
>
> "Mr. Sherman: Thank you.
>
> "The Court: However, I think we are wasting our time again and again inquiring as to when he is and when he is not telling the truth." (R.T 435)

Cross-examination continued as follows:

25. After the conversation of March 28, 1977, Andrews did not speak to Hendrix until he came to Boise, Idaho at the request of the Drug Enforcement Administration (R.T. 436).

26. After Stipa and Vander Pauwert were arrested, the petitioner called Andrews to inform him of the arrests. Andrews contacted an attorney (R.T. 436) after he called Ford. Ford had told him to get an attorney (R.T. 437), and would not talk to Andrews (R.T. 439).

On cross-examination by counsel for Stipa, Andrews testified that when he told Agent Ford that the transaction would happen if he wanted to, he felt that he had control, because the government knew nothing (R.T. 446).

Andrews gave the defendants information in order to get them off his back (R.T. 450). He had no agreement with anyone (R.T. 451). He did not really have anything to do with the defendants except to lead them astray (R.T. 453).

On redirect-examination by the

government, Andrews testified that at the December 17th meeting, Stipa brought up the subject of manufacturing amphetamines (R.T. 455). He further testified that he had obtained knowledge about manufacturing methamphetamine from people he had met in the Vietnam War and from a lot of reading that he had done (R.T. 456). Andrews does not know exactly and precisely how to chemically manufacture methamphetamine, but he does have a general idea of the process involved (R.T. 458).

On recross-examination by counsel for Stipa, Andrews testified that he does not know how to manufacture any drugs (R.T. 462).

The government called three witnesses to establish that co-defendant Stipa had requested chemicals from their companies and that these chemicals are on a list as being ingredients for methamphetamine.

The first of those witnesses was a Mrs. Kathleen Ingleby, who is the owner, with her husband, of the Chem Shop in Salt Lake City, Utah. Mrs. Ingleby testified that a man identifying himself as John Hansen of W.R. Incorporated ordered twenty-six (26)

kilogram bottles of methylamine (R.T. 202-206). Hansen telephoned several times regarding his delivery and to say that he was sending in the payment (R.T. 207-209).

Mrs. Ingleby was suspicious of Hansen and phoned the Drug Enforcement Administration and spoke with Hendrix. She explained that there was no Boise listing for W.R. Incorporated and the drug was paid for in money orders rather than in company checks. Before shipping the order, she waited for instructions from Hendrix (R.T. 210-211).

The second witness was Howard Jay Ingleby (hereinafter referred to as Ingleby), Mrs. Ingleby's husband and co-owner of the Chem Shop. Ingleby testified that Hansen called many times about his order (R.T. 224), stated that the drug would be used for a water bath with ketones (R.T. 226), and that he would have someone call the Chem Shop with his FDA number, which he never did (R.T. 227).

The third witness was Phyllis Kratzer (hereinafter referred to as Kratzer), who testified that she is an employee of

Aldrich Chemical House and was so employed on March 14, 1977 (R.T. 233).

On that date Kratzer received a mail order for six and one half (6-1/2) kilos of phenylacetone from a B. Michael Stipa (R.T. 234). Kratzer notified the Drug Enforcement Administration because the drug was listed in the company's computer as a precursor to a controlled substance (R.T. 235).

On March 17, 1977, Stipa telephoned Aldrich Chemical House and asked Kratzer if his order had been shipped. She stated that it would be shipped as soon as possible (R.T. 236). The DEA controlled the shipment (R.T. 241) and supplied the containers (R.T. 244).

After cross-examination of Andrews, Ralph Nydegger (hereinafter referred to as Nydegger), resident of a trailer court in Eagle, Idaho, was called by the government and testified that numerous calls were made from his phone to Salt Lake City in February and March, 1977. Nydegger stated that he does not know the petitioner and never heard of him until he saw his name on the subpoena (R.T. 256).

A William T. O'Brien (hereinafter referred to as O'Brien), terminal manager of Pacific International Express Trucklines, testified that he received the Salt Lake City package and contacted the DEA as he had been advised to do (R.T. 258-259). O'Brien recognized Stipa as the person who picked up the package (R.T. 261). He had never seen the petitioner before and had heard of his name only on the subpoena (R.T. 262).

The government then called two witnesses to testify that the defendants had purchased equipment to set up the methamphetamine lab. The first witness, a Janice Hart, was an employee at a hobby store and testified that on March 26, 1977, someone, who she later identified as Stipa, had purchased a centigrade thermometer, a bunson burner and a support stand (R.T. 266). The second witness, a Ronald R. Carpentier, was a pharmacist and testified that on March 6, 1977, Stipa had asked to purchase benzine (R.T. 272) and had returned that evening with two people, asking for PH paper and a tripod, which Carpentier did not have.

The petitioner was not among those at the pharmacy (R.T. 273-274).

James Look (hereinafter referred to as Look), who was qualified as an expert forensic chemist, works for the DEA (R.T. 464), Look added two ingredients to the substance found in Stipa's vehicle: mercuric chloride and steam heat. This produced methamphetamine (R.T. 466). Look testified that it is possible to make other things with P_2P besides methamphetamine (R.T. 473). He was shown the list of chemicals made by Andrews and stated that the symbols and characters set forth were written by someone who knew the chemical formula for methamphetamine (R.T. 475). The average chemist would know that he would not get methamphetamine from this combination of chemicals unless he were to use a reducing agent (R.T. 480).

The second qualified expert forensic chemist called by the government was Robert Dews (hereinafter referred to as Dews).

Dews was shown the same list of chemicals and stated that a layman could not have written it -- only someone with at

least two years of college chemistry could have written it (R.T. 663). Methamphetamine could be made from those chemicals (R.T. 664).

The government counsel also called a series of government agents to testify to the overt acts alleged to have been committed by the defendants. None of these witnesses saw the petitioner commit illegal acts.

On March 26, 1977 Cornell executed the search warrant for the petitioner's residence and arrested Stipa pursuant to an arrest warrant (R.T. 590).

In the petitioner's bedroom, Cornell seized a piece of paper on which was written the name and address of a chemical firm and the word phenylacetone beneath it (R.T. 591). Packing for a support ring was found in the fireplace (R. T. 592). Other items were seized from the bathroom and the other bedroom, in which Vander Pauwert was living (R.T. 595).

Cornell also searched the camper trailer that was parked outside the house

(R.T. 595), and seized flasks, an oily substance, tubing, a gray metal drum, glassware and methylamine (R.T. 596). Cornell was aware that Vander Pauwert was living in the petitioner's house (R. T. 611). When Cornell observed Stipa enter the Petitioner's residence with a box on March 24, 1977, neither the petitioner nor Vander Pauwert were at the house. They arrived there approximately ten minutes later and unloaded roof shingles from the Capital Roofing Truck (R. T. 613).

Cornell never saw the petitioner engage in criminal activity, but as far as involvement with people who were so engaged, the petitioner was observed in Stipa's company (R.T. 614), although Cornell could not recall when he saw the petitioner and Stipa in the petitioner's home in the absence of Vander Pauwert (R.T. 615).

When Stipa and Vander Pauwert were arrested, on March 26, 1977, the United States Attorney did not feel there was sufficient probable cause to arrest the petititioner (R.T. 623).

On May 18, 1977, an indictment was filed against the petitioner and the petitioner surrendered the same day.

Cornell spoke with Andrews on May 1 and May 18 (R.T. 624) and on the 18th, Andrews prepared a written statement. In that statement Andrews declared that he was telling the truth (R.T. 625).

At the end of the government's case-in-chief, the State of Idaho moved to quash and modify a subpoena served by the defendants upon the State of Idaho and Bureau of Narcotics Enforcement relating to investigative materials regarding the involvement of Donald Andrews in a number of other cases of the Idaho Bureau of Narcotics, or to submit them to the Court in camera, on the grounds that the records might tend to compromise on-going investigations and that they were not relevant to this instant case (R.T. 669).

Counsel for the petitioner agreed that the materials should be looked at by the Court in camera, but stated that they were necessary to further impeach Andrews, who stated that he was not involved in any on-going state investigations (R.T. 670).

The Court granted the motion to quash, stating:

> "The Court: Of course, I would think any further impeachment of that witness would be redundant. I think his veracity has been put in a rather severe issue here." (R.T. 671)

The petitioner moved to strike the testimony of those witnesses who related conversations outside of the petitioner's presence. The motion was denied. The petitioner then moved under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal (R.T. 674) on the grounds that (1) any acts committed were facilitated, aided and abetted by the United States of America in giving permission to the chemical companies to deliver these chemicals to the defendants and (2) that there was insufficient evidence connecting the petitioner to the alleged criminal acts without the testimony of Andrews, which was false and perjurous (R.T. 676).

The government responded that there was an insufficient showing of entrapment (R.T. 680) and the Court agreed. The

Court and the government continued as follows:

> "The Court: Well, let me ask you this question, then, excluding Andrews' testimony, and you will have to agree if you totally excluded his Counsel's promise and his argument -- well, you would have to find that Mr. Bailey's case is pretty flimsy, wouldn't you? The first thing you would have to do, if you didn't believe Andrews you would have to exclude the conspiracy, which would mean that the evidence against him wouldn't be admissible. I'm not saying I look at it that way, but without it, his argument, I would say, would have a good deal of merit.
>
> "Mr. Biehl: Well, I think the case against (R.T. 681) Mr. Bailey, standing on its own, without Mr. Andrews' testimony is very slim. I will agree with you there, sir. There is, I think, enough that, perhaps in a jury trial it would get past the motion, but just barely, and I do have to admit that, although there is some evidence against Mr. Bailey and an important part is that Mr. Andrews' testimony, which was independent, and the investigation of this case, which was independent, until the arrest, and when you put them together, they fit together like a puzzle, I think those two things together do prove the involvement of Mr. Bailey." (R.T. 682).

The Court denied the Petitioner's motion for acquittal, making the following findings:

> "I think I should say here that while the witness Andrews' testimony certainly was impeached, and ought to be viewed with caution, at the same time, there is a rather considerable amount of extrinsic and other evidence that tends to support much of what he said. Therefore, as a finder of the facts, I have determined to give weight to his evidence and to consider it, but look at it somewhat cautiously, and on that basis, I am satisfied that there is enough evidence at this time to indicate a guilt on behalf of Mr. Bailey. The motion for judgment of acquittal has to be denied." (R.T. 684)

The Court stated that different standards do not exist on a Motion for Acquittal than exist after submission of all the evidence in the case to the Court when there has been a waiver of jury, and that if the petitioner were not to offer any evidence, the Court would convict (R.T. 686).

Bailey testified in his own behalf, stating that he has been convicted of theft of goods in interstate commerce and

of four or five burglaries and that his last conviction was in March or April of 1971. He was released from jail on June 11, 1974 (R.T. 698) and was employed by United Roofing Company for seven or eight months. He then formed a partnership with Alinda Roofing Company, which he sold over a year later (R.T. 699).

Bailey started his own roofing company, Capital Roofing and Construction, several months later, working for United Roofing in the interim (R.T. 700).

His business is incorporated, and his wife, brother-in-law and himself each own one share.

Bailey has eight employees (R.T. 701), excluding his wife, who watches the office about three hours per day. Business has been good for the last six months, for a new company, grossing close to One Hundred Thousand Dollars ($100,000.00), netting about Thirty Thousand Dollars ($30,000.00) (R.T. 702).

The petitioner met Andrews in the Idaho State Penitentiary and once out of prison, Andrews renewed the acquaintance

with the petitioner. Bailey knows Mr. Kinzel (R.T. 703) who, when passing through Boise with Andrews, told him that a friend of his got a good buy on some damaged equipment out of the Teton Dam disaster. This generated the petitioner's interest in the Teton Dam sale.

The petitioner eventually went to the sale in Rexberg with Bob Moore and Mike Stipa (R.T. 705). The petitioner knew Stipa through the construction business (R.T. 706). They stopped in Twin Falls, Idaho to see George Kinzel because it was on the way. At Kinzel's house, they discussed the auction at Rexberg (R.T. 708). While in Twin Falls, they went to a restaurant with Andrews. The subject of drugs was not discussed (R.T. 709).

The next day, Bailey, Stipa and Moore went to Rexberg (R.T. 710). On the way home, they spent the night in Twin Falls. While they were there, Andrews cut Moore's hair. There was no illegal activity discussed, to his knowledge (R.T. 711).

The next time the petitioner saw Andrews was when he came to town with his

wife and father-in-law to do Christmas shopping. The petitioner was friends both with Kinzel and with Andrews (R.T. 712).

The petitioner saw Andrews on Christmas or the day after when Andrews and his wife took the petitioner's oldest boy on a ski trip as his Christmas present (R.T. 713).

Bailey saw Andrews a few times in January or February, 1977. When Andrews came to Boise to buy supplies, he would stop by the Bailey's residence and cut his family's hair.

At that time, the petitioner was working hard and long hours to make his business work (R.T. 714).

The petitioner had met Vander Pauwert a few years ago in California and in December or January of 1977, he brought Vander Pauwert to Idaho to get him away from his old friends in California (R.T. 716).

The petitioner never put money into the purchase of drugs, and did not know any drugs were ordered (R.T. 718).

Andrews told the petitioner that he needed a reason to stay away for the weekend and asked the petitioner to write him a check. The petitioner did so, and was never paid back (R.T. 719). Andrews never did any work for the petitioner.

The petitioner did not know that anything illegal was going on at this time.

Vander Pauwert was always out late at night with women. Stipa and Andrews acted similarly (R.T. 720).

The petitioner has never liked drugs and has never taken them.

The petitioner was not aware that any box was in his house (R.T. 721). He was beginning to get suspicious of Vander Pauwert and Stipa, but why, he did not know (R.T. 724).

On cross-examination of the petitioner by the government, the petitioner testified that when his house was searched he told officers that drugs were not his thing and that he was not involved.

When the petitioner went to Rexberg for the Teton Dam Sale, he had no other

reason for stopping in Twin Falls (R.T. 727). The merchandise was open for inspection before the auction and Bailey found nothing he wanted (R.T. 728).

He denied having taken boxes from the camper trailer on March 26, 1977, and did not see Stipa bring phenylacetone into his house on March 24, 1977 (R.T. 729).

The petitioner then called Robert G. Moore, referred to herein as Moore, who testified that he is Bailey's brother-in-law and lives at his residence. Moore has never been convicted of a crime (R.T. 744).

Moore accompanied the petitioner and Stipa to Twin Falls on their way to Rexberg, on December 17, 1976. There was no discussion of drugs (R.T. 742).

The government called Cornell to the stand as a rebuttal witness. Cornell testified that when the petitioner's house was being searched, and Stipa and Vander Pauwert were arrested, the petitioner had stated that drugs were not his thing but that he was caught in the

fringe of his friends' activities (R.T. 749).

After all the evidence was taken, the petitioner's Motion for Acquittal was renewed. The motion was denied (R.T. 757).

The Court found the petitioner guilty as charged (R.T. 757-759).

Court convened on August 8, 1977, for the purpose of sentencing. The petitioner then moved for a new trial on the grounds that the search warrant affidavit was conclusory, that a hearing was held without the petitioner and his counsel, and that the evidence against the petitioner came from the testimony of a perjured, impeached witness (R.T. 774).

The motion was denied (R.T. 777). The petitioner was sentenced to three (3) years imprisonment and to a special parole term of two (2) years (R.T. 786-787).

The petitioner was released on bond pending appeal (R.T. 789).

On appeal, the petitioner contended that the search warrant affidavit was insufficient, that the Court erred in using

the testimony of Andrews to convict petitioner, and that there was no probable cause to search the pickup truck.

In its opinion affirming the judgment of the District Court, the Court of Appeals for the Ninth Circuit determined the following:

1. That there was support for the conclusory statements in that certain hearsay statements to the affiant were corroborated "when he personally observed Stipa receive, transport and store the boxes containing chemicals used in the manufacture of methamphetamine;" and that the affiant also observed the boxes moved to the house subject to search, and that probable cause therefore existed;

2. That the Court's measure of Andrews' credibility and decision that there was extrinsic evidence to support his testimony, would not be disturbed; and

3. That Bailey lacked standing to challenge the vehicle search, but that the search was proper because of the

immediate threat to the safety of the officers and neighbors, and that evidence in plain view was properly seized.

On June 2, 1978, petitioner filed a Petition for Rehearing before the Ninth Circuit Court of Appeals. The petitioner requested a rehearing on the grounds that the Court should not have considered the conclusory statements of the affidavit nor the testimony of an impeached witness, and that the warrantless vehicle search was not justified by a safety hazard.

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER UNSUPPORTED CONCLUSORY STATEMENTS CAN BE USED TO UPHOLD A SEARCH WARRANT THAT WOULD BE INSUFFICIENT WITHOUT THEM

The warrant provision of the Fourth Amendment to the United States Constitution requires that before a magistrate can issue a search warrant, there must be "probable cause, supported by oath or affirmation." When the affidavit submitted in application for a search warrant is conclusory in its terms, Aguilar v. Texas, 378 U.S. 108 (1964), Giordenello v. United States, 357 U.S. 480 (1958), or it is unclear whether the allegations are within the applicant's personal knowledge or are unsubstantiated hearsay, United States v. Ventresca, 380 U.S. 102 (1965), then no warrant may constitutionally issue.

> "Rule 41 stipulates that such 'probable cause' shall be made to appear from an affidavit, which of and by itself must set forth facts sufficient to justify the

Commissioner in believing that appropriate grounds exist for issuance of a search warrant. Which is to say that facts--not mere conclusions of the affiant--must appear within the four corners of the affidavit so as to justify a reasonable and ordinarily prudent person in believing that there is 'probable cause' to conclude that a violation of the law has occurred, or is occurring, in the premises to be searched. The facts set forth need not be sufficient to support a verdict of guilt beyond a reasonable doubt. They must establish, however, something more than mere suspicion or possibility of criminal activity.

"No hard and fast rule can be followed in determining the sufficiency of the alleged facts to constitute 'probable cause', and each case must be determined upon its own particular merits or demerits. It may be said, however, as a general proposition, that mere conclusions of the affiant, unsupported by concrete facts, or facts alleged upon bare belief or information, unsupported by other reliable facts affirmatively averred, are inadequate in the eyes of the law to save the affidavit, and the warrant based upon it, from the court's condemnation, if genuine

'probable cause' is not shown." United States v. Office No. 508 Ricou-Brewster Bldg., 119 F.Supp. 24 (LA. 1954).

In Giordenello v. United States, supra, the issue before the Supreme Court was whether the complaint sufficiently set forth the probable cause necessary to support an arrest warrant. Preliminarily, the Court stated that the Fourth Amendment requirement applied both to search and arrest warrants.

The Court held that in neither case should the magistrate rely upon an officer's mere conclusions.

In Giordenello, supra, "the complaint contain[ed] no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it [did] not indicate any sources for the complainant's belief; and it [did] not set forth any other sufficient basis upon which a finding of probable cause could be made. We think these deficiencies could not be cured by the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer."

In the affidavit in question, the affiant makes numerous statements without stating whether he personally observed the occurrences, whether he had personal knowledge of them, the basis for his conclusions, or the sources of his beliefs. How did the affiant know whether the three opaque cardboard boxes that he observed Stipa pick up contained memometheylamine? Who observed the cardboard boxes being carried into the shed? Who observed a bottle being removed from the shed? How did the affiant come to the conclusion that John Hansen, W.R. Incorporated was a false name used by Stipa? Why did the information given the affiant by Ingleby appear credible and reliable? Why was the information given by Phyllis Kratzner considered as true? How did the affiant know that 4186 Tamarack Drive was the petitioner's house? How did the affiant know that monometheylamine was taken into the mobile home? What was the source of all this information? A few times in the affidavit, the affiant states that he personally observed something. Yet, in the places where probable cause might

have been established if specific facts had been alleged, the affiant does not state who observed what allegedly occurred or how he knew of a "fact." Most of the language in the affidavit is totally conclusory in nature.

It is well settled that an affidavit must sufficiently disclose "raw facts" to permit a magistrate to make an independent determination of the persuasiveness of facts tending to the conclusion that the specified items are located in the place to be searched, Whiteley v. Warden, 401 U.S. 560 (1971); Nathanson v. United States, 290 U.S. 41 (1933), and that the individual supplying the information as well as the information itself are dependable and reliable. Aguilar v. Texas, supra.

> "The law is plain that an affidavit is insufficient constitutionally to support a warrant if it merely states the affiant's conclusion as to the ultimate fact in issue." Aguilar v. Texas, supra.

The affiant and his unnamed sources could have obtained the alleged information through overheard conversations,

rumors, or by way of sheer speculation. The affidavit sets forth no fact from which the magistrate could have determined how the information was received. Thus, there was no way for the magistrate to assess the dependability of such information.

> "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were." Aguilar v. Texas, 398 U.S. at 114.

There is no statement within the four corners of the affidavit in the case at bench which would indicate that the "source" acquired his information from personal knowledge or in a dependable or reliable way of any sort. Aguilar v. Texas, supra, at 113, Spinelli v. United States, 393 U.S. 410 (1969).

> "Aguilar requires that a magistrate's determination of probable cause justifying the issuance of a warrant must be supported by an affidavit that discloses the underlying circumstances from which the affiant has concluded that his information is reliable and that it must contain a

> statement of the underlying circumstances 'to enable the magistrate independently to judge of the validity' of the affiant's conclusion that the things to be seized are where he says they are. (393 U.S. at 413, 89 S.Ct. at 587.)" United States v. Bailey, 458 F.2d 408, 411 (Ninth Circuit 1972); see Rice v. Wolff, 513 F.2d 1280 (Eighth Circuit 1975).

In Spinelli v. United States, supra, at 416, the Court applied the Aguilar test to an affidavit similar to that in the case at bench, and found the affidavit insufficient:

> "The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information--it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. Cf. Jaben v. United States, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345 (1965). In the

absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

Once a warrant has been executed, the affidavit cannot be rehabilitated by information known to the affiant but not disclosed to the magistrate. Whiteley v. Warden, supra, at 565.

It is respectfully submitted that disregarding the conclusory statements herein, Spinelli v. United States, supra, the affiant's personal observations do not provide probable cause.

A. "After arriving at the Kennel Club Tavern, Eagle, Idaho, the three cardboard boxes containing the bottles of Monometheylamine were carried into a shed. . . . [shed described]."

This allegation does not indicate that the action described was personally observed by the affiant or by another law enforcement officer. The allegation that the cardboard boxes contain monometheylamine is conclusory because there is no indication of how the affiant knew or learned what the boxes contained.

B. "Since that time, one bottle has been observed being removed from the tavern shed, until March 25, 1977, late in the afternoon when two boxes were removed from the tavern shed and eventually taken to a stationary mobile home trailer located at Roundy's Trailer Park, Space No. 9, Eagle, Idaho, described as being painted primer gray on either end and approximately 30' to 35' long, being the residence of Ralph Peter Nydegger, located on the South side of Idaho Highway 44 (hereinafter called the Nydegger mobil home)."

This allegation does not indicate that the action described was personally observed by the affiant or by another law enforcement officer. The allegation that the mobile home is the residence of

a Ralph Nydegger does not indicate how the affiant knew or learned the identity of the occupant of the mobile home, and is therefore conclusory.

C. "Stipa used a false name, John Hansen, W.R. Inc." This allegation is merely a conclusion. In order to have met the test in Giordinello v. United States, supra, the affiant would have had to indicate the source of this belief, and the reason for this belief.

D. "Jay Ingleby, owner of the Chem Shop, Salt Lake City, Utah, told me that Stipa originally ordered 78 kilograms of Monometheylamine and he has paid for that quantity, however, to date he has only received the three cardboard boxes, that is, 36 kilograms; that Stipa used the name of John Hansen of W.R. Inc.; that the Monometheylamine sent to Stipa was shipped in three cardboard boxes, brown in color and approximately 15" x 15" x 15" in dimension and that each box contained four 3 kilogram bottles of Monometheylamine, according to the information received by affiant from Jay Ingleby, Chem Shop, Salt Lake City, Utah, the sellor."

This allegation does not indicate how the affiant came to speak with Jay Ingleby, or what Jay Ingleby's role herein was so that his credibility or reliability might be determined. Thus, the information received by the affiant from him cannot be used to determine the sufficiency of the warrant. Once again, the names Stipa and Hansen are used interchangeably, and the allegation appears to state that Jay Ingleby told the affiant that Hansen and Stipa were the same person. This allegation is hearsay upon hearsay that cannot be credited because the informant was not proven credible or reliable. If, in fact, the affiant did not mean to state that Ingleby told him that the purchaser's real name was Stipa, this is but another conclusory allegation left unexplained.

E. "Stipa paid by means of Western Union money order. . ."

This allegation, which continues on to state that the money orders are attached as an exhibit, does not explain how the affiant gained this information

and how he obtained the money orders, nor is there any indication that the affiant personally observed the transaction.

F. "That affiant has talked with Phyllis Kratzer, an employee of the Aldrich Chemical House in Milwaukee, Wisconsin, and been told that on March 11, 1977, a male individual telephoned Aldrich Chemical House in Milwaukee, Wisconsin, identifying himself as B. Michael Stipa, telephone number 208-375-2974, and attempted to order Phenylacetone, but was advised that no orders for Phenylacetone are accepted over the telephone; that on March 15, 1977, Aldrich Chemical House in Milwaukee, Wisconsin received a certified letter No. 010508, ordering approximately 6.5 kilograms of Phenylacetone at the price of $481.00, which sum was paid by five Buttrey Food Store money orders, Nos. 5930904, 5930905, 9530906, 5930907, and 5930908, and requesting that the Phenylacetone be shipped to the buyer, B. Michael Stipa, via United Air Lines to Boise, Idaho; that the Phenylacetone so ordered was contained in a metal drum with a five gallon capacity,

which drum was inside a cardboard box approximately 16" x 16" x 20", which box had shipping markings on the outside thereof, indicating Aldrich as sender and Stipa as receiver; that such cardboard box with the metal drum containing the Phenylacetone was shipped by Aldrich Chemical House on March 22, 1977, to arrive on that day at the Boise Airport via United Air Lines."

This allegation does not indicate how the affiant came to speak with Phyllis Kratzer or what Phyllis Kratzer's role herein was so that her credibility or reliability might be determined. Nor does it state whether Phyllis Kratzer's information was within her personal knowledge or whether she was repeating what she was told. For instance, was it Kratzer who spoke with the caller who allegedly identified himself as Stipa, or did another employee of Aldrich Chemical House speak with that caller. Did Kratzer observe how the phenylacetone was allegedly packed and shipped? Clearly, there are no facts here indicating that this employee should be believed.

The standards set forth in Giordinello v. United States, supra, and Aguilar v. Texas, supra, were not met herein because although the allegation shows that the affiant had a conversation with a Phyllis Kratzer, the facts of which are not within the affiant's personal knowledge, there is nothing indicating that Phyllis Kratzer was a reliable informant and that the information that she gave him was of her own personal knowledge and credible; and the source of the affiant's belief in the truth of these assertions is not indicated.

Nowhere in the affidavit does the affiant state that Jay Ingleby and Phyllis Kratzer reported to the Drug Enforcement Administration large orders of chemicals necessary for the manufacture of methamphetamine. Nowhere in the affidavit does the affiant state that Jay Ingleby and Phyllis Kratzer knew neither the affiant nor the defendants.

Additionally, their information cannot be said to be reliable because of

what the affiant allegedly saw -- he only saw Stipa picking up opaque boxes. Whether the contents of the boxes were methey-lamine and phenylacetone, or something else, appears from the conclusory language of the affidavit to be speculation rather than personal knowledge.

G. "Affiant then followed Stipa to a residence on Tamarack described as a green one-store wood frame house with attached garage situated at 4186 Tamarack Drive, Boise, Idaho, and being the second house south of Hill Road on the east side of Tamarack Drive being the residence of Samuel Gayle Bailey (hereinafter called the Bailey residence), and observed the cardboard box being carried into the house."

This allegation concludes, without citing support therefor, that 4186 Tamarack Drive is the residence of the petitioner. How this information was acquired is not indicated. Thus, it is conclusionary. Nor is it clear when "then followed Stipa" is, or who carried the cardboard box into the house.

H. "Late in the afternoon of March 25, 1977, the five gallon metal drum was taken from the Bailey residence and taken by very circuitous route to the Nydegger mobile home arriving at approximately 10:00 am.m on March 26, 1977, whereupon the metal drum was taken into the Nydegger mobile home. This was the same time that the Monomethеylamine and other items were taken into that mobile home."

These allegations do not indicate that the actions described were personally observed by the affiant or by another officer. Furthermore, both the terms "Bailey residence" and "Nydegger mobile home" are conclusory in that the source of such information has not been disclosed. Thus, these allegations do not meet the standard applied in Giordinello v. United States, supra, to determine whether an affidavit is sufficient to establish probable cause.

I. "Officers passed by the Nydegger mobile home and observed from a distance of about 5' to 10' a very distinct and pungent odor of Phenyl-2-propanone and

the officers who observed such odor had smelled that odor before and recognized it as being Phenyl-2-propanone (a necessary precursor to manufacture of Methamphetamine)."

This allegation is insufficient in part because the nature of the odor "observed" is conclusory. The affiant has been given information by officers which includes their opinions that the odor they smelled is P_2P. The mere fact that the affiant has been told by officers that they had smelled the substance before and now recognize it is not sufficient to show that the officers possessed expertise in the area of detecting P_2P, a legal chemical.

Furthermore, the source of the affiant's knowledge of the properties of methamphetamine, or particularly, whether P_2P is a necessary precursor to the manufacture thereof, should have been revealed. Thus, the supported part of this allegation is as follows: ". . .officers passed by the. . .mobile home and observed from a distance of about 5' to 10' a very distinct and pungent odor and

the officers who observed such odor had smelled that odor before and recognized it. . ."

J. "A very strong odor of ether was observed by officers who were about 5' to 10' from the Nydegger mobile home."

For the reasons set forth above, the definition of the odor as "ether" is conclusory.

K. "That Stipa lives with his parents in a room at 9260 Cory Lane, Boise, Idaho, described as a one-story wood frame single family dwelling, rust colored wood stain in color."

This statement is conclusory because it does not state that it is based upon personal knowledge or another reliable source.

Finally, it is clear that as the opinion of William Gowan was based upon the allegations set forth in the affidavit, the opinion itself was based upon conclusions and is therefore insufficient to support probable cause. For example, in the affidavit, the affiant concludes that certain boxes contained methylamine

and phenylacetone. The opinion of William Gowan is therefore in part based upon the alleged fact that the boxes did contain these substances. As the alleged contents of the boxes cannot be used to support a finding of probable cause because they are not alleged to be within the personal knowledge of the affiant or otherwise reliable, the opinion of William Gowan, based upon the alleged fact that the boxes contained methylamine and phenylacetone, cannot support a finding of probable cause.

Without the above conclusory allegations, the affidavit may be summarized as follows:

On March 3, 1977, the affiant observed Stipa picking up three packages at the freight depot in Boise, Idaho. Each box was 15" x 15" x 15" in dimensions and was brown in color. The affiant and other officers observed Stipa drive from the depot to the Kennel Club Tavern in Eagle, Idaho, on a very circuitous route. At a later date, the affiant observed Stipa receive the shipment of another box, which box Stipa took to 4186 Tamarack Drive, Boise, Idaho.

On March 26, 1977, officers observed Stipa arrive at a mobile home at 10:00 a.m. and leave at 12:15 p.m., carrying a cardboard box approximately 16" x 16" x 16", which was placed in a pick up truck. The officers observed Stipa drive with an unknown male to a residence, leaving the box in the vehicle. At approximately 12:35 p.m., officers at the cite of the mobile home observed a strong odor and observed that the air vent on the mobile home was open.

It is clear that these allegations taken as a whole do not support a finding of probable cause. The mere fact that cardboard boxes, possibly containing chemicals, were received by Stipa, could not provide cause to believe that a crime was being committed. For that reason, the Court erred in denying the petitioner's motion to suppress.

In finding the affidavit sufficient "as a whole", the District Court and the United States Court of Appeals misconceived the basic thrust of the Supreme Court's decisions in Nathanson v. United States, supra; Giordenello v. United

States, supra; Aguilar v. Texas, supra; Spinelli v. United States, supra; and Whiteley v. Warden, supra.

> "The central proposition common to each of these decisions is that the determination of probable cause is to be made by the magistrate, not the affiant. That the agent-affiant determined the informer to be prudent cannot be a basis for sustaining this warrant unless magistrates are entitled to delegate their responsibilities to law enforcement officials. Nathanson held that an affidavit to the effect that the affiant 'has cause to suspect and does believe' that illicit liquor was located on certain premises did not sufficiently apprise the issuing magistrate of the underlying 'facts or circumstances' from which 'he can find probable cause.' 209 U.S., at 47, 54 S.Ct., at 13 (emphasis added). In Aguilar, a sworn assertion that the informant was 'a credible person' was held insufficient to enable the magistrate to assess that conclusion for himself. Only two Terms ago, we held a warrant constitutionally defective because '[t]hough the affiant swore that his confidant was "reliable", he offered the magistrate no reason in support of this conclusion.' Spinelli v. United States, 393 U.S., at 416, 89 S.Ct., at 589. Reading the assertion that the informer in this case was 'prudent' in the broadest conceivable commonsense fashion,

it does no more than claim he was 'credible' or 'reliable', i.e., that he was likely telling the truth. Such an assertion, however, is no more than a conclusion which the Constitution requires must be drawn independently by the magistrate. What this portion of the affidavit lacks are any of the underlying 'facts or circumstances' that informed the agent's conclusion and whose presentation to the magistrate would enable him to assess the probability that this determination was sufficiently plausible to justify authorizing a search of respondent's premises." United States v. Harris, 403 U.S. 573, 590-591 (Harlan, J. Dissenting, 1971)

It would be in the public interest for the Court to set to rest the above uncertainty in the law as to the way in which conclusory statements in a search warrant affidavit should be used or regarded.

II

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE TESTIMONY OF AN IMPEACHED WITNESS CAN BE THE PRIMARY BASIS OF A CONVICTION

In the case at bench, several officers were called to the stand to testify regarding their surveillance of the defendants' activities. On cross-examination of each of these officers, the officers stated that they did not observe the petitioner engaged in criminal activity. They observed him at work, and going to and from his roofing jobs.

On the date when the petitioner allegedly asked Andrews to explain how to make methamphetamine, the testimony of Andrews' father-in-law, Mr. Kinzel, makes clear that the defendants were in Twin Falls, Idaho, only because it was on their way to an auction; and that the defendants spoke with Kinzel about the auction, no mention being made of illegal activities. This fact was verified by Robert Moore.

In each instance in which the government offered evidence of overt acts of

conspiracy and proof that an attempt to manufacture methamphetamine was made, the witnesses testified that it was co-defendant Stipa who called, etc., or co-defendant Vander Pauwert who purchased, etc.

What was the evidence against the petitioner? Vander Pauwert lived in the petitioner's house. The Petitioner was friendly with Stipa and Stipa was observed at his house. Stipa was observed carrying a container into the petitioner's house. In the course of the search of the petitioner's house, a slip of paper with the name of a chemical company written on it was found. The handwriting was not identified or authenticated. The age of the paper was not tested. Ownership was assumed. Ashes were found in the petitioner's fireplace that were attributed to the wrappers from some of the equipment allegedly purchased by Stipa or Vander Pauwert. No evidence was offered that the petitioner burned the wrappings, or that Vander Pauwert did not burn them while the petitioner was at work. Finally, one officer testified that he thought he

saw the petitioner help Stipa carry a box into his residence. The problem with that testimony was that it was dark outside at the time.

Yet, it was not this testimony that convicted the petitioner -- it was the testimony of Andrews, the "unindicted co-conspirator", who stated "facts" on direct examination and in police statements, and who blantantly admitted, on cross-examination, that those "facts" were all lies. As the District Court stated on one occasion when the petitioner attempted to offer impeachment evidence of Andrews, "Of course, I would think any further impeachment of that witness would be redundant. I think his veracity has been put in a rather severe issue here." (R.T. 671).

Both the Court and the government agreed that without the testimony of Andrews, the case against the petitioner, in the words of the Court, was "pretty flimsy".

> "THE COURT: Well, let me ask you this question, then, excluding Andrews testimony, and you will have to agree

if you totally excluded his Counsel's promise and his argument -- well, you would have to find that Mr. Bailey's case is pretty flimsy, wouldn't you? The first thing you would have to do, if you didn't believe Andrews, you would have to exclude the conspiracy, which would mean that the evidence against him wouldn't be admissible. I'm not saying I look at it that way, but without it, his argument, I would say, would have a good deal of merit.

"MR. BIEHL: Well, I think the case against (R.T. 681) standing on its own, without Mr. Andrews' testimony is very slim. I will agree with you there, sir." (R.T. 682).

The Court admitted that Andrews' credibility had been impeached, and told counsel for the petitioner, who was ready to offer extrinsic evidence to further impeach Andrews, that such would be unnecessary and redundant.

"THE COURT: It's so obvious, it sort of sticks out. I dare say that you know and I know that this is not unusual in this kind of a game, the undercover game. It's a way of life and you know it and I know it, so it doesn't surprise you. However, you are entitled to make your record in this matter and you may proceed.

"MR. SHERMAN: Thank you.

"THE COURT: However, I think we are wasting our time again and again inquiring as to when he is and when he is not telling the truth." (R.T. 435).

As counsel for the petitioner stated in his Affidavit in Support of Motion for Acquittal, "Your affiant considers himself to be an experienced defense attorney and while he does not contend that the Court intended to mislead him, the Court's comments did cause defense counsel to believe that further cross-examination and impeachment of Mr. Andrews was unnecessary and that the Court only wished an explanation by Mr. Bailey in order to acquit him of the charges in this case." (C.T. 200). Yet, in denying the petitioner's Motion for Acquittal, the Court stated:

"I think I should say here that while the witness Andrews' testimony certainly was impeached, and ought to be viewed with caution, at the same time, there is a rather considerable amount of extrinsic and other evidence that tends to support much of what he said. Therefore, as a finder of the facts, I have determined to give weight to his evidence and to consider it, but look at it somewhat cautiously,

and on that basis, I am satisfied that there is enough evidence at this time to indicate a guilt on behalf of Mr. Bailey. The motion for judgment of acquittal has to be denied." (R.T. 684).

While it is true that the trier of fact ordinarily has discretion to believe or disbelieve a witness, it is clear that the purpose of impeaching a witness is clearly diminished when a witness, proven to lie on the stand so many times that his testimony could just as well be considered perjurous, is given consideration because other testimony "tends to support" much of his testimony. Such is to pretend that cross-examination and credibility of witnesses are inconsequential to a trial. Perjured testimony should be excluded as a matter of law.

On cross-examination of Andrews by counsel for the petitioner, Andrews testified that he did not want to give the defendants the formula for methamphetamine and that he did not know the formula. He testified that he picked names out of the air as chemicals and wrote them down

(R.T. 287). The government called two forensic chemists, each who testified that the list of chemicals was written by someone who knew the formula for methamphetamine; and who testified that if a catylist were added, the chemicals on the list would create methamphetamine. Andrews had testified that the entire list was garbage (R.T. 298).

Andrews lied to Drug Enforcement Administration agents Ford and Hendrix throughout the investigation (R.T. 381). He did not want to divulge any information unless it would be profitable to him (R.T. 395).

It is clear from the testimony of Andrews and from the comments made by the Court, such as: "It's so obvious, it sort of sticks out." (R.T. 435), that Andrews would say anything that would benefit his interest or be profitable.

It is apparent from the DEA tapes that Andrews spoke to the agents, truthfully or not, for one admitted reason: payment. It is also clear that Andrews took the witness stand because he did not want to

be charged as a participant in the alleged crime.

It is therefore respectfully submitted that the Court erred in considering Andrews' testimony and in giving it enough weight that the petitioner was found guilty as charged, when both the Court and the government admitted that without Andrews' perjurous testimony there would have been insufficient evidence upon which to base a conviction.

It is respectfully requested that this Court grant Certiorari to determine whether impeached testimony should ever be the primary basis of a conviction.

III

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER EXIGENT CIRCUMSTANCES, SUCH AS PUBLIC SAFETY, CAN JUSTIFY A WARRANTLESS VEHICLE SEARCH, WHEN THE EXECUTING OFFICERS HAD A CONSIDERABLE AMOUNT OF TIME IN WHICH TO APPLY FOR A SEARCH WARRANT, TO WIT, AN ENTIRE DAY, DURING WHICH THE ALLEGED HAZARD EXISTED

It has long been held that a vehicle cannot be searched without a warrant

incident to an arrest when the search is remote in time and place to the arrest, absent exigent circumstances. Preston v. United States, 376 U.S. 363, 368 (1964). Whenever a search is effected without a warrant or consent, the burden is upon the prosecution to put the search into the exception category. Stoner v. California, 376 U.S. 483, 486 (1964); Jones v. United States, 357 U.S. 493, 499 (1958); Corngold v. United States, 367 F.2d 1, 3 (9th Cir. 1966); Angello v. United States, 269 U.S. 20 (1925).

In the case at bench, the petitioner's house was searched, pursuant to a search warrant, at the time of his co-defendants' arrests. Simultaneous thereto, a vehicular search was being conducted outside the residence.

At the Motion to Suppress hearing, Agent Cornell testified that he searched the vehicle because its contents were suspected to be explosive. He admitted, however, that the vehicle had been followed for an entire day and could have been seized while in motion on bumpy roads, where the risk of explosion, if

existent, was greater.

The facts herein are similar to those in Coolidge v. New Hampshire, 403 U.S. 443 (1971).

In Coolidge v. New Hampshire, supra, "Coolidge was arrested inside his house; his car was outside in the driveway. The car was not touched until Coolidge had been removed from the scene. It was then seized and taken to the station, but it was not actually searched until two days later." Id. at 456.

In that case, the following observations were made:

> "In circumstances virtually identical to those here, Mr. Justice Black's opinion for a unanimous Court held that '[o]nce an accused is under arrest and in custody, then a search [of his car] made at another place, without a warrant, is simply not incident to the arrest.' Id., at 367, 84 S.Ct., at 883. Dyke v. Taylor Implement Mfg., Co., 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538. Cf. Chambers v. Maroney, 399 U.S. 42, 47, 90 S.Ct. 1975, 1979, 26 L.Ed.2d 419. Search-incident doctrine, in short, has no applicability to this case." Id., at 457.

"The underlying rationale of Carroll[3/] and of all the cases that have followed it is that there is

> 'a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' 267 U.S., at 153, 45 S.Ct., at 285. (Emphasis supplied.)" Id., at 460.

"In this case, the police had known for some time of the probable role of the Pontiac car in the crime. Coolidge was aware that he was a suspect in the Mason murder, but he had been extremely cooperative throughout the investigation, and there was no indication that he meant to flee. He had already had ample opportunity to destroy any evidence he thought incriminating. There is no suggestion that, on the night in question, the car was being used for any illegal purpose, and it was regularly parked in the driveway of his house. The opportunity for search was thus hardly 'fleeting.'" Id., at 460.

In the case at bench, not only was there ample opportunity to obtain a

3/ Carroll v. United States, 267 U.S. 132 (1924)

search warrant when the warrant to search the petitioner's house was procured, but there was a lack of emergency at the time the search took place. The vehicle was stationary. There had already been ample time to destroy incriminating evidence. The vehicle was less explosive than when it was driven around throughout the day.

In its Opinion, the Court of Appeals for the Ninth Circuit stated that exigent circumstances, i.e., volatile chemicals that posed an immediate threat of harm, justified the failure to obtain a warrant, citing Chambers v. Maroney, 399 U.S. 42 (1970). Yet, the vehicle in question containing the chemicals was followed for an entire day before it was searched. During that entire period of time, the officers suspected that it contained explosive chemicals.

Certainly, if the circumstances were exigent, a search should have commenced at the beginning of the day. If the officers could take an entire day to watch the vehicle, they had an entire day to obtain a warrant. Here, as in Collidge v. New Hampshire, 403 U.S. 443, 460 (1971),

the opportunity for search was hardly "fleeting."

It is therefore respectfully requested that this Court determine whether a warrant is required when there is sufficient time to obtain one.

CONCLUSION

WHEREFORE, for all of the reasons and upon all of the considerations set forth above, the petitioner respectfully prays that a Writ of Certiorari issue in the within case to review the decision of the Court of Appeals below.

Respectfully submitted,

RICHARD G. SHERMAN
Counsel for Petitioner

APPENDIX A

FILED
MAY 18, 1978

EMIL E. MELFI, JR.
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. SAMUEL G. BAILEY, Defendant-Appellant, JON KEITH VANDER PAUWERT; and BEHRNARD MICHAEL STIPA, Defendants.	)

No. 77-2892

MEMORANDUM

Appeal from the United States District Court for the District of Idaho

Before: DUNIWAY, SNEED and TANG, Circuit Judges.

Bailey appeals from criminal convictions after trial to the court for violations of 21 U.S.C. § 846, conspiracy to manufacture methamphetamine, a controlled

substance; 21 U.S.C. § 843(b), willful and knowing use of a communication facility, to facilitate acts constituting a felony; and 18 U.S.C. § 846, 841(a) (1) and 21 U.S.C. § 2, attempt to manufacture a measurable amount of methamphetamine. Bailey asserts four errors. Upon review, we affirm.

Bailey's first challenge is that the District Court erred in denying his motion to suppress based upon flaws in the search warrant affidavit. The specific attack is that the affidavit is based upon conclusions not supported by facts and when facts are presented, the sources are not identified nor within the affiant's personal knowledge. Aguilar v. Texas, 378 U.S. 108 (1964).

Affidavits for search warrants must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. United States v. Ventresca, 380 U.S. 102 (1965). Reading the questioned affidavit in such a commonsense fashion, we find support for the conclusory statements in that certain hearsay statements to the affiant were corroborated when he

personally observed co-defendant Stipa (previously identified to him) receive, transport and store the boxes containing chemicals used in the manufacture of methamphetamine. The affiant also observed the movement of the boxes to the house that was the subject of the search. Taking the affidavit within its four corners, it provided sufficient facts for a magistrate to determine that probable cause existed.

Bailey's second argument is that the court should not have believed the testimony of the unindicted co-conspirator. This argument is based upon the co-conspirator's impeachment at trial.

The credibility of a witness is determined by the fact finder and the rule is that an appellate court will assume that the lower court correctly measured credibility. DeWelles v. United States, 378 F.2d 37, 39 (9th Cir. 1967) cert. denied 389 U.S. 996 (1967).

The court found that although the witness's testimony certainly was impeached, there was extrinsic evidence to support

his testimony. We are not persuaded that the court erred in choosing to believe the government's witness and the finding will not be disturbed.

Bailey's third contention is that his motion to suppress the evidence seized from the vehicle was improperly denied. To have standing to contest the search, Bailey must show that he was on the premises at the time of the contested search, allege a proprietary or possessory interest in the premises or be charged with an offense that includes as an essential element, possession of the seized evidence at the time of the contested search and seizure. United States v. Prueitt, 540 F.2d 995 (9th Cir. 1976) cert. denied 429 U.S. 1063 (1977).

Bailey was at his residence where the searched vehicle was parked but was not in the vehicle when it was searched. The vehicle belonged to the father of a co-defendant, not to Bailey, and he had neither a proprietary nor a possessory interest in the vehicle. Finally, Bailey was charged and convicted of conspiracy, the use of a telephone to facilitate acts

constituting a felony and attempt to manufacture methamphetamine. Possession of the seized evidence is not an essential element of any of these crimes. Therefore, Bailey lacks standing to contest the search of the vehicle.

Even if Bailey had standing to contest the search, it was proper because exigent circumstances justified the failure to obtain a warrant. Chambers v. Maroney, 399 U.S. 42 (1970).

The agents had reason to believe from their surveillance that the camper contained volatile chemicals that posed an immediate threat to the safety of the officers and neighbors. Because of that fear it was reasonable that the agents search the vehicle and attached trailer to eliminate the safety hazard. The evidence in plain view was properly seized. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

Bailey's final contention is that it was error for the court to hold a pretrial conference at which neither he nor his counsel were present. This issue was not raised below and is not properly

before us. Evans v. Valley West Shopping Center, Inc., No. 75-3780 (9th Cir. January 6, 1978); Rothman v. Hospital Service of Southern California, 510 F.2d 956, 960 (9th Cir. 1975).

However, we have nevertheless reviewed the record and we find the meeting did not result in prejudice. Bailey's counsel had one day's notice of this meeting and relied upon a co-defendant's counsel to keep him informed of matteres determined in the pre-trial conference. They included notice of a motion to suppress, possibility of jury waiver, adequacy of discovery, anticipated testimony of a government informant and a statement by the court that a continuance would be granted, if needed. We find no prejudicial error.

AFFIRMED.

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